# THE PROFESSION AND LEGAL EDUCATION

WESLEY A. STURGES*

I trust that the announced title of my paper will seem to warrant a discussion of certain aspects of current programming of legal education which I believe involve a serious shortcoming in our training of would-be lawyers. I hope that my criticism will be credited with intent to be constructive; it is not intended merely to make complaint. I also trust that the announced title of my paper will justify some consideration of the thought that the profession and the law schools bear co-responsibility and mutual opportunity for the education of our future lawyers.

I also wish to emphasize at this point that I shall undertake to discuss only some of the simpler and more elementary aspects of my general thesis—some of the simpler and more elementary aspects of what I believe to be a serious deficiency in contemporary legal education.

As we all know, legal education has been taken over in large part by law schools, which, generally, are organized and maintained within an established university; the earlier practice of "learning law" by reading it in the office of a practicing attorney has been largely discontinued. Most candidates for the bar now engage in a course of study at a law school.

Our law schools may be said, therefore, to bear the major responsibility for American legal education; and so do they enjoy whatever opportunity there may be to undertake its improvement. But I am prompted to emphasize that the legal profession also has substantial power in the premises and, by the same token, shares in the responsibility for the objectives, scope, content and technique of legal education. And it may, of course, claim credit for its contributions to the improvement of the process. In most jurisidictions, the legal profession prescribes minimum prerequisites of legal-schooling for one to qualify to become a candidate for admission to the bar, and, by such examinations as it may deem desirable, does it test the candidate for his attainments and qualifications in his legal studies and deduce his competence to become a practicing lawyer. Accordingly, the legal profession should be recognized as sharing, in a substantial way,

*Dean, School of Law, Yale University.

in the responsibility for current law school objectives and for the scope and content of law school curricula and techniques of training.

The principal criticism of current legal education which I shall consider in this paper involves what appears to be a quite general consensus as to the objectives of the undergraduate law course. Apparently, there is quite general agreement, both among law school faculties and at the bar, that law school instruction of undergraduate law students should be devoted to their training for what I shall presume to designate as a too narrow conception of "the practice of law."

American law school announcements are quite generally to the effect that the course of instruction offered at the school is designed to qualify the undergraduate law student for "the practice of law." The challenging questions are: (1) What is meant by "the practice of law," and why? (2) What should it mean in programming the objectives of a law school? I should add, somewhat parenthetically, that I have observed little avowed purpose to train law students to become judges. Perhaps this would be explained on the basis that, as the judiciary is derived from the practicing bar, so do judges derive their special competence from prior service in "the practice of law," and so the training for their special competence is beyond the law school.

I have gained the conclusion that law schools generally intend by their declared purpose to prepare students for "the practice of law," that they plan to develop competence of their students primarily in the following particulars: (1) to render technical advice to clients, (2) to prepare and handle technical papers for clients, and (3) to initiate and defend cases and to plead and argue technical causes in judicial and similar proceedings. There are those, indeed, who seem to urge that this common thought as to the proper training of the future lawyer should be so positively enforced that it will be made to delimit the total scope, content and purport of his legal education. To do otherwise, it is said, would, for example, blur the identity of the school as a law school, and give it the stamp of some nondescript institution for promiscuous instruction in their social sciences—or whatnot. This view is probably most likely to be heard at the time of budget or when the school's graduates make an unfavorable impression on some bar examiners.

Let us look a little more in detail at what, apparently, is the current American conception of "the practice of law."

(1) *Concerning the rendering of technical advice to clients.*

(Please understand that I do not intend to belittle the importance of training for this or any of the other functions of lawyers in "the practice of law" in what I call its narrower sense—nor do I believe that it should be unduly inflated.)

The lawyer's license to practice law authorizes him to profess competence and willingness to search the law books for a client who discloses his situation and advise him upon his right and duty therein. The lawyer's license permits him to charge for this service. He will search for similarities and for analogies, and he will look for and evaluate contrasts and differences. Declarations of general principle—preferably with some ethical appeal—may seem significant. And texts of legislation which seem pertinent will be taken into account. He will arrange and organize his conclusions of his observations of the facts and law in order to maximize the plausibility and persuasiveness of his opinion. His advice will be essentially a prophecy as to what will be a decision in a judicial or similar proceeding if the client shall assert a right or deny a responsibility in accord with the advice. Our great law libraries containing the multitude of reported judicial decisions bear witness that while the lawyer for one party prophesied well for him, the lawyer for the other party bore false prophecy to him.

(2) *Concerning the preparation of technical papers.* By his license the lawyer is authorized to represent his competence and willingness to look up the law as written in the books, and prepare technical papers upon which the client may rely. By his license he may charge for this service.

Again, the lawyer's work is essentially a prophecy. What would be the decision in a judicial or similar proceeding were the client to be challenged in his rights as asserted under the paper or were he to be challenged in his denial of responsibility in reliance upon the paper. Pains and pleasures of the prophecy will be realized by the lawyer and his client not unlike those accruing in other instances of legal advisory services which are put to test.

(3) *Concerning the pleading and argument of technical causes.* By his license the lawyer is authorized to represent his competence to look up the law as written in the books, to determine the rules of practice and procedure of the court or similar law-making agency, whereby he, the lawyer, may, in the exercise of his exclusive professional privilege, properly set about to invoke the jurisdiction and judgment of the court. Here, again, the lawyer's work is essentially a prophecy as to what a jury, the trial judge, the appellate court, or similar agency of government will determine and decide, if his course

of action is contested. It may be emphasized that in these instances the decision may seem to the client to be of quite interlocutory nature and remote from the adjudication of the merits of his claim. It also may seem to him to relate to matters not inconsiderably esoteric and ephemeral. He may never appreciate why the service of process was void; nor why his complaint failed to state a cause of action; nor why his answer was wrong; nor why the verdict was against the evidence; nor why the "law of the case" got into his case. Indeed, he may be very confused as to whether he has won or lost in the court of justice.

The many volumes of law books recording adjudications upon questions of procedure, practice, evidence, trials and appeals, again bear witness to the hazards of legal prophecy concerning the rules relating to the pleading and argument of technical causes.

I trust that I am substantially correct in identifying the foregoing items of vocational activity (and I do not use the term disparagingly) as being generally regarded in legal circles as "the practice of law" and that training for proficiency therein is generally regarded as the proper and sufficient objective of undergraduate legal education.

I believe that such a program is too limited and that law school training should be revised and extended. I believe that the current conception of what is the practice of law is too narrow. I entertain this belief because I cannot (and would not) disregard the fact that there are many other types and classes of engagements in our civil affairs for which lawyers recurringly, and as a matter of course, represent their competence and readiness to undertake for reward. Many of these additional undertakings are much more comprehensive than the items of law practice to which I have referred. Some of them are, of course, more closely allied than others with the narrower conception of the practice of law; and competence in "the practice of law" in the narrow sense may, of course, facilitate the lawyer's participation in many of his additional activities. These additional undertakings by lawyers are easily guessed. I refer to the positions of power in our economic, political and social affairs which, I believe, are accorded to and undertaken by lawyers more than any other single group of our society—by the lawyer more than the cleric, doctor, engineer or teacher. Law school graduates engage themselves almost as matter of course in a great many of the most powerful positions of society which involve the making of social policy. In addition to manning our judicial systems and law administration, (1) they take on the role of makers of national and local policy as the members of the Congress and of state and municipal legislatures; (2) they exercise the policy-making

powers of executive officers in federal, state and municipal government, as cabinet members, governors, mayors, and the like; (3) they constitute the dominant and decision-making personnel in federal, state and local administrative agencies; (4) they exercise decision-making power in the governing authorities of our commercial and business units, in the governing authorities of our universities and of our public and private school systems, and of our churches; (5) they become advisors on policy to great aggregations of capital and labor; and the decisions so made may be quite as pervasive of the public welfare as judicial decisions or legislation. So it is that society accords the lawyer group—more than any other group, I believe—prestige, power, and control in our civil affairs, and vests in the group its trust to shape and determine major portions of our economic, political, and social life.

In short, here is the making and management of government. A recent writer, in discussing the legal profession, has aptly commented: "Whereas the physician's responsibility is almost exclusively to the human body, the lawyer's is largely to the body politic. . . Public welfare is more in his hands than that of any other group."[1]

The making and management of government are no mean responsibilities and no mean opportunities. We who practice adherence to our democratic plan of government and to our democratic principles of life generally are fearful to entrust these responsibilities, opportunities and powers in any person or group of persons lest they prove to be the demagogue. We remember each day that "eternal vigilance is the price of liberty" and that the instinct for power—whether political, economic, or social—is virulent and an ever-present threat to the instinct for freedom. And, as we look around the world today, we Americans well appreciate once again what has been so aptly stated by a recent graduate of my own Law School that: "We in America are engaged in a great continuing defiance of history. All the manifold chapters of man's courageous effort to mold and direct his political and economic destiny have closed with a sorry postlude of despotism, disillusion and despair."[2]

We in America are hopeful that those who make and manage government shall be liberally supplied with wide intelligence and that they shall have capacity and purpose to exercise informed, calculated and deliberate judgments devoted to making our democracy work. Lawyers are the key group, the dominant decision-making personnel in these affairs.

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[1]Hull, PROVIDENCE EVENING JOURNAL, 1949.

[2]Wilkerson, *What is the Proper Place and Function of the Lawyer in Society,* 35 A.B.A.J. 555.

It is with these thoughts in mind that I believe it desirable and demanding that the law schools and the legal profession take a more comprehensive view of the objectives of legal education, and that they extend—or at least revise—curricula and techniques for training of law students with the hope that they may be better qualified for the additional roles and undertakings of society in which so many of them will become active and powerful.

Of course, it may be urged that it already takes three years or more to train an undergraduate law student adequately to qualify him to enter upon "the practice of law" in even its narrower scope. I doubt that it can be established that all of the present three-year course is necessary to bring about the desired competence in law students for the practice of law in its more restricted sense.

In this connection I am prompted to digress slightly to concede and suggest that in my previous description of "the practice of law" in the narrower sense, I may have tended to overstate the complexities and hazards of the process. I refer to the lawyer's undertaking, after recourse to the fact situation of his client and to the law as written in the books, to prophesy for his client eventual judicial behavior. I am prompted to say now that I am not certain that the degree of assurance to be given the client is likely to be so definitive as I may have tended to indicate. This is true because I have come to believe, especially during recent times, that a substantial part of the practicing profession, at least, has come to realize the expediency of doubt as to the predictability of judicial behavior and to be less confident of the efficiency of syllogisms based upon adjudicated cases and allied techniques of traditional advocacy in influencing that behavior. With the growing tendency, as I gather it is, for judges to decide particular cases as they think they ought to be decided, without undue reliance upon stare decisis, analogy, contrast, or generality of principle which may be argued by counsel, I gain the impression that lawyers' advices to their clients may be cast in more pragmatic and temporizing tenor indicating in effect, that, in the opinion of counsel, the prophecy ought to prove true, "but one never can be sure what the court will do." Current *ad hoc* jurisprudence at the appellate level prompts caution at the bar in advising what is "the law." And so I repeat, especially in view of this possible amelioration of the rigors of the practice of law, I doubt that it can be established that all of the present three-year law school course is indispensable to develop whatever competence may now be wrought in law students for the practice of law in its narrower sense. Only if content of curriculum to be covered in a law course is to be regarded as inexorably controlling, is the present three-year course already absorbed or overburdened. And it

seems easy to believe that the accumulation of quantity of content in required undergraduate curricula of law schools is already beset by diminishing returns for training for even the narrower practice of law.

Furthermore, I should urge that to expand, or revise, the course of instruction in furtherance of the purpose to qualify would-be lawyers more comprehensively in their probable fields of the wider law practice need not divorce the student from fit and adequate training for the more limited practice. Indeed, the expanded conception of the scope and objectives of legal education for which I pray would be accomplished not so much by the net addition of new content as by the re-evaluation and substitution of content, revision of training techniques, and the challenging of student interest in those fields of social concerns generally allied with law administration, including anthropology, sociology, history, philosophy, political science and economics.

Of course, it may be urged that law students will have acquired all necessary background and training in those fields while in college and that, therefore, given their training for the narrower practice of law, it is unnecessary to recognize the necessity of training them while in law school for the wider practice of law to which I have referred. Or, if such background has not been obtained while in college, it may be urged that it may be obtained by going to schools of business administration, government, public administration, or schools for general graduate study.

There is no competent evidence, so far as I can find, that the graduates of any of the schools last named are any more qualified to undertake training in the processes and powers of the making and management of government than are the current graduates of law schools who have been trained for the narrower practice of law. And it seems neither desirable nor necessary to postpone any such additional training for law students until they have completed their law school course.

I also believe that it is unduly optimistic to conclude that young bachelors from the colleges emerge with a fit background and training for the wider law practice which I have mentioned. Indeed, the view is often voiced that they are not. And there seems to be general consensus as to the specifications of why they are not. Before I venture to set forth these specifications, I will take brief note of the fact that, in many cases, the freshman who comes to the law school will not have been in undergraduate college long enough to earn his bachelor's degree. Accordingly, his training and maturity may fall short of that of the regular college bachelor. We know that many law schools require only the permissible minimum of college work for admission

and that it is less than the four-year course. Accordingly, in setting forth the following specifications of the educational shortcoming for college bachelors, there is a probability that many freshmen who come to many law schools will have had less educational background and maturity than the usual college graduate.

I now return to specifications of why the freshman, as regular college bachelors or less, who come to law school do not have fit educational background for the wider practice of law which I have mentioned. And it is by reason of these specifications as to the lack of qualifications of the beginning law student that the responsibilities and opportunities of the law schools for reorientation of legal education should be emphasized. I will summarize these specifications as follows:

(1) That widespread illiteracy obtains among college graduates. By this I mean want of competence effectively to read, spell or write the English language, and even more to read, spell or write any foreign language. Accordingly, there is want of capacity to acquire and apply intelligence. In line with this specification, I will quote from a recent report of the Committees on Legal Education of an outstanding bar association and law society.[3] And I may add somewhat parenthetically that the report seems properly to indicate that the traditional law school course contributes little in overcoming this specification. The report is as follows:

> The proper use of our language is essential to the practice of law, and yet it is thought that the present standard of English employed by graduates is deplorably low. A student may receive instruction from the Faculty upon the interpretation, legality, *etc.* of a contract, but it must assume his capacity to express a contract in appropriate words. Often this assumption is unjustified. It will be little help at the bar to know all of the rules of evidence if the ability to examine a witness in intelligible English is lacking. It is recommended that a student at law should be required to show proficiency in his own language and at least a good acquaintance with another. It is the opinion of these Committees that consideration should be given to such prerequisites, even before the University years. It is understood that advice and guidance is given to students at High Schools upon their future careers. It might be explained there that the profession of the law has few advantages for those who cannot speak or write their mother tongue simply and clearly.

And as college graduates are illiterate, so, I will add, are they destitute of vocabulary and of understanding of semantics.

(2) As widespread illiteracy attends college graduates, and as they

[3]British Columbia Bar Association and the British Columbia Law Society, 1949.

are destitute of vocabulary and unappreciative of the variable functions of language, so are they the beneficiaries of widespread ignorance. And the areas of that ignorance are of vital concern when they are identified for the would-be lawyer as being in the fields of anthropology, philosophy, economics, sociology and government, including structures and functions of government, processes of law administration, and their history. Startling is this ignorance because one wonders to what extent the young college bachelor has been made adequately competent by his college education to undertake even the minimum responsibilities and opportunities of citizenship. Even more serious is it when it is recognized in our future functionaries of government. Let me read in this connection from the report of Professor Harry Jones, of the Columbia Law School, on his experience in teaching a course entitled "Legal Method" to freshmen in the Columbia Law School:[4]

> Every teacher knows that the most effective device in the introduction of a beginner to a new discipline is the use of the analogy to some familiar area of the beginner's experience. If the students in a typical Legal Method course shared any field of common knowledge—whether it be classics, biology, or the history of art—analogies to that field might be used to illumine introductory discussions of lawyers' problems and shorten the long jump from college to law school. If, for example, all members of the class had an elementary knowledge of physics, a cross-reference to the concept of "vectors" would do much to sharpen student comprehension of what is involved in the process which law professors call the synthesis of decisions. As it is, references to baseball and football are about the only useful analogies I have been able to arrive at in three terms of teaching Legal Method.

Professor Jones also observes:

> Every entering law class is made up of students of superior college achievement [per Columbia Law School admission requirements] . . .[But] One student in five will have studied English constitutional history, and he will know little, if anything, concerning the development of English legal institutions [much less, I will add, of other parts of the world]. Everyone in the class will have a general familiarity with economic theory, but few will be aware of the elementary facts of life about ordinary business practices and procedures. And most beginning students enter law school with no grasp of the course of American economic and political history, without which the corresponding developments in legal doctrine are largely unintelligible.

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[4] *Notes on the Teaching of Legal Method,* 1 J. LEGAL EDUC. 13 (1948).

(3) As so many college graduates are illiterate and ignorant in the elements of citizenship, so do they indulge in herd instinct to jump for the answer of controverted issues with relative indifference toward the process of deriving the answer and with little caution toward the problems of verifying that process.

(4) Accordingly, are they gullible, extremists, non-critical and scarcely deliberative in their judgments, and intolerant of compromise or pragmatic adjustments based upon empirical considerations. Black is black, and white is white without shades or tints.

(5) Again, they appear to have little confidence in themselves to diagnose, analyze and resolve new situations which come before them.

(6) And so are they indigent in their knowledge of personal and social relationships and indifferent to the values of competing social structures and functions and to their personal responsibilities and opportunities for making judgments concerning them.

In short, and by summary, these specifications leave many of the beginners at law school bearing the handicaps of illiteracy and of ignorance of the affairs of man and of citizenship. So do they leave the newcomers to law wanting in competence for the intelligent exercise of the processes of learning, lack of confidence and purpose for making calculated, deliberate and informed judgments, and lacking in appreciation and understanding of the problems of social organization and of the relative values of competing social-political structures, ideologies and functions.

This summary upon the would-be lawyers who are likely to come to the law school prompts the bringing together of two additional thoughts.

In the first place, the tenor of statement of the foregoing specifications of the education of college bachelors may be thought to imply sharp criticism and blame not only of undergraduate colleges but also of college graduates themselves. I am not interested in allocating blame in the premises. I doubt that it would serve any present useful purpose. Moreover, when one takes into account the quality of pre-collegiate education, and when one takes into account the apparent necessities of accommodating ever-increasing numbers of students in the colleges and the traditional techniques of collegiate instruction—especially the lecture method which seems to predominate—and when one takes into account the immaturity of the undergraduate and the

immaturity of his contemporaries and the immaturity of the community which they create, and when one takes into account their uncertainty, if not indifference, at that time as to the election of their future careers, one may be considerably charitable toward the college and its doings for the undergraduate, and considerably charitable toward the undergraduate for what he did and did not do in the course of his college years. At the same time, however, I should not wish to imply that there is no room for improvement in the current collegiate educational program.

In the second place, the foregoing summary of specifications upon collegiate education weighs quite directly against any effective programming of pre-legal education in the colleges. It seems quite probable that the prescription of a pre-legal curriculum is to be carried out in the undergraduate college would help very litle to overcome the deficiencies to which I have referred. This is true for several reasons. I will mention only some of them. Such a program quite probably would involve present frailties of going techniques of college instruction, including large classes and the lecture method. Such a program would be devoid of any substantial association of such a curriculum with correlative legal materials. Such advanced programming of the undergraduate could not be predicated upon his greater maturity nor would it change the juvenile environment of the undergraduate college. College undergraduates may generally be expected to be even more uncertain as to their future careers and more unqualified to decide whether or not to be lawyers than at the completion of their four years of college. In short, I doubt that the undergraduate college is either the time or the place to begin the broader education for would-be lawyers for which I hope.

These further thoughts reinforce the view, I believe, that the law schools should recognize it as the responsibility of the professional law school to overcome the shortcomings of non-professional undergraduate education and that the legal profession should accord its positive support. And I venture to urge once more that it be undertaken because of the extraordinary privileges and powers which society vests in the lawyer, including the making and management of government which in turn so directly determine the realities of our democratic ideologies.

I will now re-emphasize that the methods and scope of bar examinations will be a direct and substantial factor in determining for American law schools what progress, if any, may be made to establish a more comprehensive course of legal schooling to qualify for the more comprehensive law practice to which I have referred. The

administration of bar examinations will be likely to determine for most law schools what curriculum shall be offered. The prescribing of required subjects or the listing of designated subjects which may be covered by the examinations is an ever-present and powerful factor to this end. Students' potential interests in any subjects not listed are likely to be choked off by the students themselves with an eye on the examination requirements; struggle by the school for reputability and need for financial support tend to require it to maintain high ratio of successful candidates on the examinations; faculty are likely to gain little, if any, spirit to experiment with subject matters outside those listed for the examinations, curriculum, faculty and student body tend to conform to this remote control of the bar examiners.

When one reviews the subject matters which are prescribed or suggested for bar examinations, one concludes that many bar examiners are primarily, if not exclusively, concerned with testing for sufficient evidence of potential competence for what I have heretofore referred to as the narrower practice of law. Accordingly, does the narrow conception of the objectives of legal education tend to grow and prosper. Techniques of cramming become most likely accessories in the accomplishment of those objectives. By these methods students are treated to the quantitative assimilation of "the law"—without much effective inquiry into or appreciation of the progmatic patterns and vagaries of even the narrower practice of law. And so may freshly bound legal encyclopedia come to the bar. Experience with the human beings who are the realities of the judicial and legislative processes should soon be persuasive of how illusory was their quest for quantity or certainty of "the law".

On the other hand, bar examiners may encourage and stimulate an amended course of law study, which I believe is vital to the more comprehensive training of the would-be lawyer for the more comprehensive practice of law to which I have referred.

I will pause at this point to indicate that I do not contest the prerogative of the legal profession through its bar examiners to determine the qualifications of candidates for admission to the practice of law. Nor do I protest the propriety or desirability of such post-law school testings. At the same time, I do wish to reserve privilege to criticize or praise bar examination practices not only as to content, techniques and bases of evaluation of results observed, but also as to policies of control upon the programming of legal education which they reflect.

I will conclude these comments with consideration of one further

point. That will be the question: How shall the proposed amendment of the law school course be organized and put into effect? I have no blue print of a plan for American law schools, nor do I think it feasible to attempt one. Willingness to challenge the traditional programming of our schooling of would-be lawyers and purpose to experiment in planning improvement should, of course, be cited as a common call upon the law school community in this connection. But the many differences in the situations of the law schools suggest the view that each school can best work out its own plan. Admission standards and practices, existing curricula, present school policies toward freedom of students in electing their work, variety of methods of instruction, qualifications, interests, variety of talent and competence of faculties, their claims of vested interest in existing curricula and many other considerations will vary and fluctuate in the several law schools. All of these matters must be reckoned with in undertaking reorientation to the suggested amendment of our objectives. It also is clear that there need be no single technique nor pattern of procedure to accomplish such revision of objectives of legal education.

But whatever may be the plan or procedure, I believe that one will best succeed, in the case of most law schools at least, which is conceived and executed by cooperative action of the School and the Profession. And, for reasons which I already have indicated, the accomplishment of the proposed reorientation of legal schooling is the joint responsibility and common opportunity of the profession and the law school.